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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

—v.—

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AS *AMICI CURIAE* OF WOMEN'S HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of Respondent Humberto Alvarez-Machain, with the written consent of the parties.[1] Amici include leading women's human rights organizations in the United States and around the world that have been working to end impunity for grave violations of the human rights of women, to challenge violations, and to support women seeking justice. *Amici* join in this brief to emphasize the importance of the Alien Tort Claims Act (ATCA) in providing a civil forum through which a limited number of individual women victims of such violations, can hold accountable perpetrators who are in the United States. *Amici* wish to underscore that, thereby, the ATCA contributes to end impunity and to justice, healing, and empowerment for the individuals involved, and for women around the globe. It also contributes to the global understanding of the gravity and impermissibility of such gender-specific violations, to the deterrence of these crimes, and to the advancement of equality for women in everyday life.

SUMMARY OF ARGUMENT

In regard to the first question presented concerning the scope of judicial authority conferred by the ATCA, it is the purpose of this brief to elucidate the importance of the ATCA claim to ending impunity for perpetrators of sexual and gender violence and to enabling the federal courts to participate fully in the evolution and enforcement of customary international law.

Women are victims of the full range of traditionally recognized human rights violations such as summary

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[1] Letters of consent have been filed by the parties with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici,* their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

execution, torture, arbitrary detention and enslavement. More frequently however, women suffer victimization through sexual and gender violence, atrocious crimes that have, until recently, been cloaked with impunity. Although rape and sexual abuse in war and other conflict situations have long been recognized as war crimes and as acts constitutive of crimes against humanity, this violence has rarely been prosecuted either internationally or nationally. In the last decade, wit the participation of the United States, customary international law has evolved in significant ways, making clear through state practice and judicial discernment of international law, including by the International Tribunals and the federal courts in ATCA cases, that rape and other sexual gender violence are core violations of customary international law.

Notwithstanding this clarification of customary norms, access to justice is very difficult for all marginalized groups and particularly so for women. Women seeking judicial redress suffer, in many contexts, lack of juridicial equality, lack of access to information and resources necessary to access justice, discriminatory, hostile, or insensitive methods of investigation, well-founded fear of retraumatization in the judicial process, danger of retaliation where perpetrators are powerful and they are unprotected, and the silencing effect of gender-based stigma and shame associated with sexual violence in all cultures.

These factors, together with the need to find legal assistance abroad and to serve the defendant in this country, combine to make ATCA cases the exception. Nonetheless, the ATCA is one among a number of growing national and international remedies which enables a small number of survivors to seek redress outside of their communities where there is no effective remedy. These cases do not only contribute to the healing of survivors of atrocities; each challenge to impunity for gender-based international crimes

gives hope to women throughout the world who cannot access justice, deters violations, furthers the possibility of gender equality, and gives meaning and force to the rule of law.

The ATCA also enables the federal courts to contribute to the international judicial discourse as to customary norms and under what circumstances they are violated and should be vindicated. While judicial decisions are a subsidiary source of international law, the careful discernment of international custom demanded under the ATCA, such jurisprudence has played a significant role in the clarification of customary norms since the widely recognized landmark *Filartiga* decision in 1980. Given that the international community has increasingly adopted the principle of an independent judiciary as a critical guarantor of democracy, it would be ironic and tragic if this Court were to relinquish the important role conferred upon the federal judiciary by Congress to discern and repair tortuous violations of international law, and thereby, to participate in the global dialogue concerning accountability for international wrongs.

Finally, to distort, as petitioners seek, the ATCA into a mere grant of jurisdiction and render it nugatory would signal a dangerous weakening of the commitment of this nation to ending gross violations and denying a safe haven form human rights violators. For women throughout the world, it would dash the hope engendered by even the remote possibility of accountability for international crimes against women. If the petitioners wish to curtain ATCA jurisdiction, their plea is appropriately addressed not to this Court but to Congress.

For these reasons, the decision of the Ninth Circuit Court of Appeals that the ATCA confers jurisdiction over claims constituting torts in violation of the treaties of the United States and law of nations should be affirmed.

ARGUMENT

POINT I. Though Long Condemned, Rape And Other Forms Of Sexual And Gender Violence Have Been Inflicted With Impunity.

In recent years, the terrible gravity and prevalence of gender violence and persecution have become priority issues for the international community and for this nation as has the addressing the impunity enjoyed by the perpetrators of these crimes.

A. Impunity For Violence Against Women Is Rooted In And Perpetuates Women's Inequality And Subordinate Status.

Rape, sexual mutilation, sexual humiliation, sexual slavery and forced pregnancy occur with alarming regularity in war and conflict situations. Women have long been treated as "booty" in war, the reward and fuel to keep soldiers fighting. During World War II, the Japanese army created "comfort stations" where approximately 200,000 women, and girls as young as twelve, were sexually enslaved and raped repeatedly.[2] Today, tens of thousands of women and girls are bought, abducted and deceived into sexual slavery and forced labor, serving militaries, corporations, and individuals.[3] Women are raped to destroy their health, their will, their social belonging and their reproductive capacity; they are also raped to humiliate male relations who are often forced to watch helplessly and to dominate and shatter the community.

[2] *Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Commission on Human Rights, Subcommittee on the Protection of Human Rights, 50th Sess., Agenda Item 6, at 52, E/CN.4/Sub.2/1998/13 (1998) (Gay McDougall, Special Rapporteur) (hereinafter *McDougall, Contemporary Forms of Slavery).*

[3] *Id.*; *see also Recent Developments in U.S. Government Efforts to End Human Trafficking,* U.S. Department of State, Feb. 5, 2004, available at http://www.state.gov/g/tip/rls/fs/28548.htm.

Sexual violence is used to punish and subjugate women who embrace non-traditional political roles. Sexual violence has also been a part of genocidal strategies, to incite people to violence, to force women to bear the violators' children, and to destroy their reproductive capabilities. Their bodies are used as vessels to destroy their very own communities. Women have suffered the foreseeable consequences of pregnancy and infection with HIV/AIDS, and have been purposely infected as part of a genocidal policy.[4] One Tutsi woman recalls being told prior to being raped, "I have AIDS and I want to give it to you."[5]

In a 2003 resolution the United Nations' Commission on Human Rights stressed that violence against women occurs "within the context of de jure and de facto discrimination against women and the lower status accorded to women."[6] As Dr. Kelly D. Askin states, "women were considered 'property,' owned or controlled by men. . . . The rape of a woman was not considered a crime against her, but instead a crime against the man's property."[7]

> Due to women's subordinate status, sexual violence is often treated as a moral issue, and not a problem of violence. As women are viewed as bearers of morality, the classical

[4] *Report on the Situation of Human Rights in Rwanda*, U.N. Commission on Human Rights, 52nd Sess., Agenda Item 10, at 17, 20, U.N. Doc. E/CN.4/1996/68 (1996) (Rene Degni-Segui, Special Rapporteur).

[5] *Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict*, U.N. Commission on Human Rights, 54th Sess., Agenda Item 9(a), at Part II., U.N. Doc. E/CN.4/1998/54/Add.1 (1998) (Ms. Radhika Coomaraswamy, Special Rapporteur).

[6] HCHR Res. 2003/45, *Elimination of Violence Against Women*, U.N. Hum. Rts. Comm., 59th mtg., at 8, U.N. Doc. E/CN.4/2003/L.11/Add.4 (2003).

[7] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288, 297 (2003).

approach to rape and sexual violence presents a legal structure that is deeply suspicious of the victim.[8] Sexual violence is thus a tactic to terrorize women and make them vulnerable and dependent.[9]

B. Though Sexual Violence Has Long Been Recognized As War Crimes And Crimes Against Humanity, Impunity Has, Until Recently, Been The Practical Reality.

Before today, only the Lieber Code of 1863, an Order filed by the United States Secretary of War under President Lincoln during the Civil War, explicitly treated rape as a grave offense.[10] Subsequently, rape and sexual violence were implicit in other offenses or characterized in moralistic terms. The 1907 Hague Convention IV, Article 46 protected "[f]amily honour and rights[,]" and required that "the lives of persons . . . must be respected," which was understood to protect women from rape.[11] Sexual violence was likewise not enumerated in the London or Tokyo Charters creating the postwar International Military Tribunals at Nuremberg[12] and

[8] *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, U.N. Hum. Rts. Comm., 59th Sess., Agenda Item 12(a), at 18, U.N. Doc. E/CN.4/2003/75 (2003) (Ms. Radhika Coomaraswamy, Special Rapporteur).

[9] Michelle Jarvis, U.N. Division for the Advancement of Women, *Sexual Violence and Armed Conflict: United Nations Response*, Women2000 (1998), *available at* www.un.org/womenwatch/daw/public/w2apr98.htm (last visited Feb. 24, 2004).

[10] Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* 35-36 (1997).

[11] Convention Respecting the Laws and Customs of War on Land (Second Hague, IV), (18 Oct. 1907), 36 Stat. 2277, T.S. No. 539 (entered into force 26 Jan. 1910).

[12] The official documents of the Nuremberg Trial are contained in *Trial of the Major War Crimes Before the International Military Tribunal, Nov. 14, 1945 to Oct. 1, 1946* (1947).

for the Far East (IMTFE-Tokyo),[13] respectively. In Nuremberg, some evidence of sexual violence was received but not mentioned in the Judgment, and despite the naming of rape as a crime against humanity in the Allied Control Council Law No. 10, governing the remaining war crimes trials, there were no prosecutions.[14] In the IMTFE, because of the notoriety of the "rape of Nanking," the crime of rape was charged and formed the basis of convictions. At the same time, the most extensive system of military sexual slavery euphemistically identified as "comfort women" was untouched.

The codification of laws and customs of war in the four 1949 Geneva Conventions called for protection of women but did not make rape a grave breach or an explicit offense in international armed conflict; in non-international armed conflict, it was implicit as "outrages against personal dignity, in particular humiliating and degrading treatment."[15] The 1977 Protocol I to the Geneva Conventions pertaining to international armed conflict, reiterated the language of common article 3(1)(c) adding "enforced prostitution and any form of indecent assault."[16] Protocol II, applicable to non-

[13] Documents of the Tokyo Trial are reproduced in the *Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East* (R. Pritchard & S. Zaide eds., 1981).

[14] *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity, Allied Control Council Law No. 10,* Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, (Jan. 31, 1946).

[15] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287, Art. 3(1)(c). *Compare* Art. 147 (grave breaches) *with* Art. 27 (protection against "any attack on their honour, in particular against rape, enforced prostitution, or any other form of sexual assault").

[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1331 (entered into force Dec. 7, 1978) Art. 76.

international armed conflict, added rape to its list of dignitary offenses.[17]

Despite this implicit and explicit legal condemnation of sexual violation against women, enforcement has been rare and impunity the practice. And although there have been legal advances, the obstacles to their enforcement create widespread impunity. To give impunity to gender-specific crimes is to support the underlying structures and unequal power relations between men and women and perpetuate the subordination of women. As the McDougall Report on Contemporary Forms of Slavery emphasized:

> [t]he right to an effective remedy is clearly essential in overcoming impunity and non-accountability for sexual slavery, rape and other acts of sexual violence in armed conflict, and the rights of victims of these atrocities must be vindicated and redressed.[18]

The ATCA is one small but critical step in the direction of ending impunity generally and to insuring that the United States does not become a haven of impunity in particular.

POINT II. The Recent Evolution Of International Law Has Made Clear The Consensus Of Nations That Rape And Other Forms Of Sexual Violence Are Among The Gravest Violations Of The Law Of Nations.

With respect to both human rights and humanitarian law, the 1993 Vienna Convention on Human Rights was a

[17] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) Art. 4(c).

[18] *Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, 50th Sess., Agenda Item 6, at 89, E/CN.4/Sub.2/1998/13 (1998).

watershed.[19] Recognizing the urgency of eliminating gender-based violence throughout the world, the Convention agreed:

> [v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery and forced pregnancy, require particularly effective response.[20]

Thereby, the World Conference set in motion the international and national machinery that has affirmed the acceptance by the community of nations, that rape and sexual violence, -- when committed by state actors, or by non-state actors as war crimes, crimes against humanity, genocide and slavery, -- are violations of customary international law.[21]

A. Gender-Specific Violence And Persecution Constitute Core Violations Of Customary Norms Of International Law.

Appalled by revelations of the widespread rape and sexual violence in armed conflict, the international community has made clear that these violations rank among the most serious of offenses under the treaties and laws and customs of war. Codifying the evolved customary norms, the Rome Statute of the International Criminal Court (ICC Statute) lists "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of

[19] World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (12 July 1993) paras. 18, 37-44 (hereinafter *Vienna Conference*).

[20] *Id.* para. 38.

[21] Customary international law is formed by consistent state practice accepted as law (opinio juris). *See* ICJ Statute, art. 38, June 26, 1945, 59 Stat. 1055, 1060, U.S.T.S. 993.

sexual violence..." as both grave breaches and serious violations of the laws of war.[22] Although the United States has not ratified the Rome Statute, these crimes, applicable to international and non-international conflict alike, were viewed as reflecting customary norms and were adopted overwhelmingly, with the active concurrence of the United States, by the body of nations negotiating the ICC statute.[23] Despite the Bush Administration's "unsigning" of the ICC Statute, the State Department affirms that the "U.S. is emphatically committed to international accountability for war crimes, crimes against humanity and genocide."[24] This evolution is also reflected in the jurisprudence of the ICTY and the ICTR.[25]

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[22] Rome Statute of the International Criminal Court, 1998 Sess. arts. 8(2)(b)(xxii) and 8(2)(e)(vi) U.N. Doc. A/CONF.183/9 (1998) (entered into force July 1, 2002).

[23] The State Department Fact Sheet explains that the Bush Administration's "unsigning" was designed to free it to oppose the Court's jurisdiction over non-parties, the independent powers of the prosecutor, and the power of the Court to proceed without the consent of states or the Security Council, and not the normative status of the enumerated crimes. *See* DOS Fact Sheet at. http://www.state.gov/s/wci/fs/2002/9978.htm (last visited Feb. 26, 2004).

[24] *Id.*

[25] Statute of the International Criminal Tribunal for the Former Yugoslavia, Adopted 25 May 1993, (hereinafter "ICTY"), S.C. Res. 827, U.N. SCOR, 48rh Sess., 3217th mtg. At 29, U.N. Doc. S/827/1993 (1993). Statute of the International Criminal Tribunal for Rwanda 8 Nov. 1995 (hereinafter "ICTR"), S.C. Res. 955, U.S. SCOR, 49th Sess., 3453d mtg. At 15, U.N. Doc. S/INF/50 Annes (1994). While under Article 38(d) of the Statute of the International Court of Justice judicial decisions are classified as a "subsidiary means for the determination of rules of law," decisions grounded on judicial discernment of state practice and norms carry significant weight as evidence of international customary law.

[26] In signing the statute, President Clinton made clear his support of the norms and his doubts only about aspects of the enforcement mechanism itself. Likewise, in unsigning the statute, President Bush reaffirmed the support of the Administration for the prevention and punishment of the crimes contained in the statute.

Recent developments in the law of, and international jurisprudence interpreting, crimes against humanity also made clear that rape and sexual violence can constitute a crime against humanity when committed as part of a widespread or systematic attack on a civilian population.[27] The ICC Statute incorporates as crimes against humanity the same list of sexual violence as was crimes. Further it explicitly recognizes that the crime against humanity of persecution incorporates gender-based persecution which may occur independently or as part of an attack on national, ethnical, racial, or religious or other population targeted by persecution.[28]

B. Rape And Other Forms Of Sexual Violence Have Also Been Recognized As Torture, Enslavement And Genocide Under International Law.

There has also been widespread recognition that such violence constitutes other well-established customary violations, particularly torture, enslavement and genocide. This development is significant to underscoring the gravity of gender violence and to ensuring that it cannot again be marginalized or trivialized.

The recognition that rape and grave forms of sexual violence amount to torture has been consistently reaffirmed in numerous contexts contributing both to the interpretation of pertinent treaties and to customary international law.[29]

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[27] ICTY Statute, art. 5(g); ICTR Statute, art. 3(g); ICC Statute, art. 7(1)(g).

[28] ICC Statute 7(g), 7(h).

[29] *See Declaration Violence*, Art. 3(h); *CEDAW Recommendation No.19*, para. 7(b); *see also* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, *adopted* July 17, 1998, Article 8 (2) (a) (xxii) which states that the sexual violence listed as "war crimes" "also constitut[e] a grave breach of the Geneva Conventions." Art. 8(2)(b)(xxvii) or, for non-international armed conflict, "a serious

Adjudicatory bodies have played a significant role. Rape and sexual violence have been held forms of torture in decisions by the ICTY and ICTR,[30] as well as in regional human rights commissions and courts in both custodial and non-custodial contexts.[31] Significantly, the *Kunarac* Appeals Chamber made clear that the torture element of "intentional infliction of severe physical or mental pain or suffering" is *per se* satisfied by rape.[32]

Rape and sexual violence may also constitute crimes of enslavement, forced labor and trafficking under international law. The McDougall Report, Contemporary Forms of Slavery, identifies a range of enslavement practices, including sexual slavery.[33] The ICC Statute codified, for the first time, the crime of "sexual slavery" as both a war crime and a crime against humanity,[34] and the ICTY recognized that detention, rape and sexual violence constituted enslavement under international law.[35]

Rape and forced pregnancy have also been recognized as acts of genocide. Genocide consists of a specified list of acts when "committed with the intent to destroy, in whole or

violation of article 3 common to the four Geneva Conventions," art. 8(2)(e)(vi).

[30] *Prosecutor v. Furundzija,* Case No. IT-95-17/1-T (ICTY July 16, 1998) para. 163 (Trial Judgement) (rape in detention and interrogation); *Prosecutor v. Delalic,* Case No. IT-96-21 (ICTY Mar. 21, 1996) (repeated forced anal and vaginal intercourse); *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T (Trial Judgement) (ICTR Sept. 2, 1998) (analogizing rape and torture).

[31] *Aydin v. Turkey,* Eur. Ct. H.R. 25/09/1997, *Mejia v. Peru,* Case 10.970, Inter-Am, C.H.R. 157, OEA/se L/V/II 91, doc. 7 rev. (1996).

[32] *Kunarac,* Trial Judgement, paras. 150-51.

[33] Ms. McDougall, Contemporary Forms of Slavery, paras. 27-33.

[34] *See,* e.g. *ICC Statute,* Art. 7(1)(g)(crimes against humanity and 8(2)(b)(xxii) and 8(2)(e)(vi)(war crimes in international and non-international armed conflict). mon to the four Geneva Conventions."

[35] *Kunarac,* Trial Judgement, paras. 542-43; Appeal Judgement, para. 119.

in part, a national, ethnical, racial or religious group as such."[36] In the Trial Chamber's landmark decision in *Akayesu*, the ICTR recognized rape and other sexual violence, including forced pregnancy, as acts of genocide.[37] This holding was subsequently incorporated by the ICC Statute.[38]

In addition, the role of gender-specific propaganda, urging sexual violence and casting women as demons and traitors, has been recognized as contributing to genocide.[39]

C. Forced Disappearance Has Evolved Recently As An International Violation Encompassing As An Element The Suffering Of Those Left Behind Who Are Disproportionately Women.

Enforced disappearance as an independent international crime has likewise evolved in the recent decades.[40] The multiple harms of forced disappearance were

[36] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., Annex, U.N. Doc S25704 (1993), (hereinafter *ICTY Statute*), Such acts include not only killing but also "causing serious bodily or mental harm to members of the group," "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;" and "imposing measures intended to prevent births within the group. Convention on the Prevention and Punishment of Genocide, *ratified by the U.S* Nov. 25, 1988, 78 U.N.T.S. 277 (hereinafter *Genocide Convention*), Art. II. *See also,* ICTY Statute, art. 4; ICTR Statute, art. 2; and ICC Statute, art. 6.

[37] *Akayesu,* Trial Judgement, para 731.

[38] *See, e.g.* ICC Statute, Elements Annex, Article 6(b) n.3 (causing serious bodily or mental "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment").

[39] *Akayesu,* Trial Judgement, para. 422; *id.* at para. 452.

[40] Inter-American Convention on Forced Disappearance of Persons, adopted in 1994 by the G.A. of the O.A.S; *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c) (1987) (includes disappearance as a violation of the international law of human rights); *Annual Report of the Inter-American*

brought to the world's attention by the Madres de la Plaza de Mayo in Buenos Aires, Argentina, a courageous group of women who demonstrated on a weekly basis and demanded information and the return of their loved ones. The crime of forced disappearance constitutes not only "the abduction by state officials or their agents" but also the subsequent "official refusal to acknowledge the abduction or to disclose the detainee's fate."[41] The crime thus recognizes the impact of "anguish and sorrow" on the disappeared person's family, an impact that falls heavily on women, who often remain as heads of households.[42] Forced disappearance is thus an example of a newly evolved customary violation that recognizes the gravity of women's suffering and responds to new challenges to human rights.

Commission on Human Rights, Organization of American States, AG/Res. 666 (XIII-0/83) (1983) (denouncing disappearance as "an affront to the conscience of the hemisphere and...a crime against humanity").

[41] *Forti v. Suarez-Mason*, 694 F.Supp. 707, 711 (N.D. Cal. 1998) (finding "the existence of a universal and obligatory international proscription of the tort of "causing disappearance").

[42] *See* Draft International Convention on the Protection of All Persons from Enforced Disappearance, art. 24, para. 3 (19 August 1998) at E/CN.4/Sub.2/1998/19 (defining "victims of the offense" to include persons who have a "direct relationship" with the disappeared and recognizing that the scope extends at least to the disappeared person's "relatives, and any dependent who has a direct relationship to him or her"); *see also* Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133 (1992) (as interpreted by the G.A. in its 92nd plenary meeting, 18 December 1992 at A/RES/47/132 recognizing the "anguish and sorrows caused by those disappearances..." to the "the families concerned, who are unsure of the fate of their relatives").

1. United States Courts, Adjudicating ATCA Cases, Have Contributed To And/Or Incorporated These Developments.

The foregoing international developments have been either presaged or been followed by federal courts as well as supported by successive United States administrations. Federal courts have recognized that rape is a form of torture[43] and that rape and torture are *jus cogens* violations actionable under the ATCA regardless of state participation when such acts are committed in furtherance of war crimes[44] or genocide.[45]

Several ATCA cases have recognized enslavement torts: trafficking and involuntary servitude in *Topo v. Dhir*, a case brought by an immigrant domestic worker,[46] forced labor in *In re World war II Era Japanese Forced Labor Litigation*[47] and *Doe v. Unocal*,[48] slavery in *Ahmed v.*

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[43] *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263, 30-31(9th Cir. 2001) vacated by, rehearing, en bank, granted by, 2003 U.S. App. LEXIS 2716, 2003 Cal. Daily Op. Service 1388, 2003 D.A.R. 1815 (9th Cir. Feb. 14, 2003). *Id.*, 28 citing *Farmer v. Brennan*, 511 U.S. 825 (1994) (Blackmun, J., concurring) (describing brutal prison rape as "equivalent of" and "nothing less than torture."); *In re Extradition of Suarez-Mason*, 694 F.Supp. 676, 682 (N.D. Cal. 1988) (stating that "shock sessions were interspersed with rapes and *other forms of torture*"(emphasis added in Unocal)).

[44] *Karadzic*, 70 F.3d at 242 (2d Cir. 1995).

[45] *Karadzic*, 70 F.3d at 242 (rape, forced impregnation, and other forms of torture "designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats" pled acts of genocide) *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263, 30-31(9th Cir. 2002).

[46] *Topo v. Dhir*, 2003 U.S. Dist. LEXIS 21937, *13-14 (S.D.N.Y 2003).

[47] *In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp. 2d 1160, 1179 (N.D. Cal. 2001) (recognizing forced labor claim under ATCA but finding plaintiffs' claim was time-barred).

[48] *Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263, *32-34 (9th Cir. 2002), vacated by, rehearing, en bank, granted by, 2003 U.S. App. LEXIS

Hoque.[49] The federal courts have also participated in the recognition of forced disappearance as a violation of customary international law.[50]

POINT III. The ATCA Enables the Federal Courts to Contribute to the Global Process of Evolving International Customary Norms as well as Preserves the Role of the United States Courts as a Bulwark Against Impunity

ATCA assures a forum in United States federal court for aliens who have suffered in tort for violations of international law. In so doing, ATCA represents one of a growing number of national and international remedies and assures that the United States is a bulwark against the widespread impunity for gender crimes discussed above. Functionally, ATCA plays two important roles in combating the impunity. First, and most directly, ATCA provides a direct claim under the developing international norms where all of the other jurisdictional requisites are met. Second, claims brought under ATCA in United States courts assure that the United States judiciary will continue its vital contributions to the development and implementation of customary international law and to ending impunity for grave violations.[51]

2716, 2003 Cal. Daily Op. Service 1388, 2003 D.A.R. 1815 (9th Cir. Feb. 14, 2003).

[49] *Ahmed v. Hoque*, 2002 U.S. Dist. LEXIS 14852, *22-23 (S.D.N.Y 2002) (recognizing individual liability for violation of international norms prohibiting slavery but dismissing plaintiff's claim on grounds of diplomatic immunity).

[50] *Forti v. Suarez-Mason*, 694 F.Supp. 707, 711 (N.D. Cal. 1998).

[51] While ATCA is not the exclusive grounds upon which litigants may bring claims under international law, *see e.g.* Torture Victim Protection Act, 28 U.S.C. Sec. 1350 note, and Trafficking Victims Protection Act, 22 U.S.C. Sec. 7101, ATCA is the most comprehensive and adaptable in light of the developing international norms and new challenges to human rights.

A. This Court Should Not Permit The United States To Become A Haven Of Impunity For Those Who Have Committed Rape And Other Sexual Violence In Violation Of International Law

Impunity for claims under international law is inconsistent with both international law and settled United States law. From the time of the drafting and ratification of the Constitution to the present, the law of nations has been considered to be part of the common law of the United States.[52] As with the common law itself, the evolving scope and content of the law of nations is incorporated into the law of the United States.[53] Moreover, in enacting the Torture Victim Protection Act in 1992, 28 U.S.C. Sec. 1350 note, Congress affirmed both the recent application of the ATCA to human rights violations based on the holding in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), and that the evolving norms of international law are incorporated into United States law.[54]

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[52] *See* Brief of Professors of Federal Jurisdiction and Legal History As *Amici Curiae* in Support of Petitioner, Sec. II.A. *See e.g. United States v. Smith,* 18 U.S. 153, 161 (1820) (referring in parentheses to law of nations as "part of the common law"). *See also The Paquete Habana,* 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions depending upon it are duly presented for their determination.").

[53] *See e.g. The Paquete Habana,* 175 U.S. at 686-711 (Court examined sources of international law, including the practice of nations in the years following the ratification of the United States Constitution through the late nineteenth century, to determine that norm had ripened protecting coastal fishing vessels from confiscation by warring navies).

[54] The legislative history of the Torture Victim Protection Act states "[TVPA] claims based on torture or summary executions do not exhaust the list of actions that may be appropriately covered by [ATCA] section 1350. That *statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of*

Impunity is contrary to the general rule that courts should hear the claims properly before them. As this Court stated in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990), "[C]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."

While in limited circumstances courts may invoke certain prudential doctrines – such as the act of state, sovereign immunity, political question or forum non-conveniens, these doctrines are closely circumscribed so as not to unduly restrict the rights of claimants to seek justice. As a plurality of this Court stated in *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 756, 763 (1972), "The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law, including international law." Similarly, as to the political question doctrine, "[o]ne of the Judiciary's characteristic roles is to interpret statutes, and [courts]cannot shirk this responsibility merely because [the] decision may have significant political overtones." *Japan Whaling Association v. American Cetacean Society,* 478 U.S. 221, 230 (1986). Except in those specific instances in which these prudential doctrines may apply, tort claims brought alleging violations of the law of nations fall well within the competencies of the judiciary and should be heard.[55] To

customary international law." H.R. Conf. Rep. 102-367, pt. 1 (1991). P.L. 102-256, Torture Victim Protection Act of 1991 H.R. No. 102-367(I), 85, November 25, 1991 (emphasis added).

[55] *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428 (1964) ("It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a

decline to exercise its rightful authority is contrary to this nation's historic commitment to remedying wrongs and countering impunity.

B. Through Its ATCA Jurisprudence, As Well As Other Cases Concerning International Law, The United States Judiciary Makes An Important Contribution To The Evolution Of Customary International Law.

ATCA and related decisions by federal courts have contributed to the development of customary international law, specifically in the definition and requirements of serious crimes that particularly affect women, such as rape, torture, slavery-like practices and genocide. To convert ATCA into a mere jurisdictional grant as petitioners claim and require Congressional authorization for each substantive violation would inappropriately tie the hands of this Court and forfeit its potential leadership role in the discernment and enforcement of international law. As international law is also the law of the United States, this Court should be particularly wary of eliminating the role of the federal judiciary in the evolution of norms under international law.

International Tribunals and national courts abroad have relied on United States courts' interpretations of international law in cases brought under ATCA. *See, e,g,, Furundzija,*[56] relying in part on the Second Circuit's decision in *Filartiga* and on five other ATCA cases for the proposition that torture violates a *jus cogens* norm;[57] *Kunarac,* relying on *Karadic*, 70 F.3d at 243-44, that where torture and rape are

principle not inconsistent with the national interest or with international justice."); *c.f. Japan Whaling Assoc.,* 478 U.S. at 230 (it nevertheless is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance") (*citing Baker v. Carr,* 369 U.S. 186, 211 (1969)).

[56] *Prosecutor v. Furundzija*, IT-95-17/1-1, Trial Judgment at para. 147.

[57] *Id.*, para 153, n. 170.

committed in furtherance of war crimes and genocide, liability attaches to non-state actors.[58]

The European Court of Human Rights (ECHR) also examined ATCA decisions in relation to whether sovereign immunity should bar a torture claim filed in the United Kingdom against the government of Kuwait.[59] In its decision, the ECHR noted that foreign courts, including in ATCA decisions, granted immunity when plead in most civil cases.[60] In 1998, when Spain requested the extradition of Augusto Pinochet, the United Kingdom's House of Lords also consulted nine ATCA decisions on the issue of sovereign immunity in suits alleging violations of customary international law among other materials.[61] The U.S. was noted for its frequent grant of immunity in suits alleging violations of customary norms.

Further, as noted above, United States Courts under ATCA have contributed very specifically to the discernment and evolution of customary international norms against gender violence, as well as other evolving norms such as forced disappearance which have a disproportionate impact on women. Petitioners' argument that the Court should abdicate its historic role, authorized and reaffirmed by Congress, subject to Congress' revising authority, threatens its ability to shape the direction of international law.

[58] *Prosecutor v. Kunarac,* (Trial Judgment at para. 470 (i)).
[59] *Case of Al-Adsani v. The United Kingdom*, App. No. 35763/97. (Judgment, Strasbourg 1997).
[60] *Id.* Para. 23.
[61] *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte*, [2001] AC 6.

POINT IV. The Significance Of ATCA Is Heightened Given That Persistent Obstacles Prevent Women, And In Particular Victims Of Sexual Violence From Accessing Justice

It was not until October 1997 that, for the first time in history, a woman took the stand to testify to her experience as a victim of sexual violence before an international criminal tribunal.[62] Three years later, in August 2000, Bosnian Muslim women presented the first testimony of captivity, rape and torture in an ATCA suit.[63]

Victims of human rights violations in general face risks to themselves and their loved ones and suffer multiple legal, economic, social, cultural and psychological barriers to obtaining justice particularly in their own countries.[64] At the same time, virtually everywhere, women face heightened and additional barriers to prosecuting sexual violence crimes as a result of the persistence of gender-based discrimination and subordination. Not surprisingly, the World Health Organization found that the "vast majority of rapes worldwide go unreported."[65]

[62] Radhika Coomaraswamy, Third Minority Rights Lecture at Hotel Intercontinental, Geneva (May 25, 1999)available at http://www.sacw.net/Wmov/RCoomaraswamyOnHonour.html (last visited Feb. 25, 2004).
[63] John Sullivan, Bosnian Woman, Describing War Ordeal, Faints in U.S. Court, N.Y. Times, August 2, 2000, §A, at 3.
[64] In applying to ATCA cases the ten-year statute of limitations Congress provided in the Torture Victims Protection Act, one court noted that "ACTA plaintiffs confront obstacles not generally present in state tort and wrongful death suits: difficulties of gathering evidence sufficient to support a complaint; unavailability or hesitation of witnesses who may fear reprisal by a corrupt regime; [and] other delays caused by ongoing human rights violations." *Wiwa v. Royal Dutch Petroleum & Shell,* 2002 U.S. Dist. LEXIS 3293, at *61 (S.D.N.Y., Fev. 28, 2002).
[65] World Health Organization, World Report on Violence and Health (2002).

Discriminatory attitudes have shaped municipal legal norms and procedures and thereby women's expectations of justice.[66] Traditional societal and legal hostility to sexual violence claims conditions women not to seek or expect justice for sexual violence crimes and carries over into conflict and post-conflict situations as well. While developments in the International Criminal Tribunals have begun to remove some of the most discriminatory evidentiary requirements,[67] the legacy of long-standing discrimination is tenacious. Based on a special mission to examine the

[66] Special Rapporteur, Ms.Gay J. McDougall reports:

> gender-based discrimination [is]codified in criminal laws and justice systems around the world: rape and other forms of sexual assaults that are defined as crimes against the community and not against the individual victim, even though non-sexual assaults are defined as crimes against the individual victim; rape being defined as acts committed by a man against a woman (not his wife), even though men are also victims of sexual violence; ...evidentiary laws which accord less weight to evidence if presented by a woman; evidentiary laws in rape and sexual assault cases which require women to provide corroborating testimony from men; substantive laws which provide that a married woman who is unsuccessful in proving that she was raped can then be charged with adultery; penalties for sexual violence which allow a man convicted of rape to avoid punishment if he marries the victim.

Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict, UN Commission on Human Rights, Sub-Committee on the Prevention of Discrimination and Protection of Minorities, 50th Sess., Prov. Agenda Item 6, at 95, 96, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter *McDougall, Contemporary Forms of Slavery*].

[67] See ICTR, Rules of Procedure and Evidence, Rule 96, U.N. Doc. IT/32/Rev.20 (2001); ICTR Rules of Procedure and Evidence, Rule 96, U.N. Doc. ITR/3/REV.1 (1995), & International Criminal Court Statute, Rules of Procedure and Evidence, Rule 70, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

operations of the ICTR, Ms. Radhika Coomaraswamy, the UN Special Rapporteur on Violence Against Women found that the investigative and prosecutorial staff was primarily male and inadequately trained[68] and failed to pro-actively investigate sexual violence on a par with other crimes, resulting in the fact that despite massive sexual violence, few cases came to the Prosecutor's attention.[69]

Such factors are widespread and cause women to fear being treated dismissively or being retraumatized in the legal process. Cultural barriers may heighten the problem and ill-trained judges may fail to enforce the rules against abusive and impermissible questioning.

Women also keep acts of violence against them secret out of fear of retaliation and further acts of violence by perpetrators, armed groups, and even communities and families.[70] Revealing sexual violence is life-threatening even in non-conflict situations. Many women cannot afford the risk of revealing their identities to defendants especially where the perpetrators are local officials or where the perpetrators belong to the same community. Despite rules requiring confidentiality, a U.N. study notes that "judges have taken little or no action to prevent and punish the copying of confidential court transcripts, which have been sent back to the communities where the widows are living among the killers. A number of women in the ICTR paid

[68] *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Addendum Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict, U.N. Commission on Human Rights, 54th Sess., Prov. Agenda Item 9(a), at 4, U.N. Doc. E/CN.4/1998/54/ Add.1 (1998) [hereinafter Coomaraswamy, *Mission to Rwanda*].

[69] Coomaraswamy, *Mission to Rwanda*, p. 11, para. 5.

[70] Elisabeth Rehn & Ellen Johnson Sirleaf, Women, War and Peace: The Independent Expert's Assessment of the Impact of Armed Conflict on Women and Women's Role in Peace-building 17 (2002) para. 95.(hereinafter, *Women War and Peace*).

with their lives."[71] Such conditions may make it impossible for women to press charges locally especially when victim/witness protection programs are non-existent, inadequate or inappropriate.[72]

Breaking silence and seeking justice for sexual violence may also risk violence at the hands of family members. Women in every society fear being punished, or stigmatized as immoral or "ruined property" and thus may blame themselves for their victimization. A major non-governmental study of the problems in prosecutions for sexual violence concluded: "In patriarchal societies, rejection from a husband or potential marriage . . ., can be a matter of life and death for the victim. Becoming an outcast means the demise of her social network and near insurmountable challenges in building a future."[73]

Social and cultural isolation exacerbates health problems resulting from sexual violence. Some women must grapple with the horror of pregnancy or infection with HIV/AIDS resulting from rape, while others with destruction of their capacity to enjoy their sexuality or bear children.[74] Many women are enervated by severe and often suicidal depression, psychosomatic pain and illness, and perceived loss of identity.[75]

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[71] *Women War and Peace*, para. 95.

[72] Coomaraswamy, *Mission to Rwanda*, p. 12, para. 8. In the ICTR, the "[Victims Witness Protection Unit] suggested that special schemes for the most threatened witnesses to be relocated outside Rwanda should be explored and the international community has not responded. Fear about immigration formalities coupled with financial implications and the security of the people involved were cited as possible reasons for such reluctance." Coomaraswamy, *Mission to Rwanda*, p.13, para. 12.

[73] Voices From The Field: About Prosecution Of Sexualized Violence In An International Context 28 (Linda Ohman, ed. 2004) (hereinafter *Voices From The Field*).

[74] Coomaraswamy, Mission to Rwanda, p. 16, para. 2.

[75] *Id.* at 17, para. 2.

While the failure to prosecute is often attributed to and justified on the basis of victims' shame and fear, this is the consequence not of personal weakness or failing but of continuing discrimination and subordination. The availability of justice is a partial but crucial means of breaking the cycle of silence and despair.

A. Access To Justice For Victims Of Customary International Violations Is Critical To Women's Healing And Empowerment And To Deterring Such Crimes As Well As Advancing The Equality Of Women.

Despite all these risks, women are increasingly seeking to participate in justice. A support officer of the ICTY Victims and Witnesses Unit provided several reasons: "To speak for the dead, to look for justice in the present, to help the truth be known by the world; in the hope that such crimes can be prevented in the future."[76] A young woman in Rwanda complained to a field officer that many of the perpetrators were in exile.

> It is as if they are being rewarded for the crimes they committed. They deserve to be punished. And what is happening to us here? We have been reduced to suffering, begging and misery. It is as if we are the guilty ones. We would like you to be a voice for us, by asking the United Nations and the international community for justice. Then we can rebuild our lives.[77]

These statements underscore the importance of access to justice. As Mr. Theo Van Boven, the Special Rapporteur on the right to reparation for victims of gross violations of human rights and humanitarian law noted, "all victims of

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[76] Women, War & Peace, para. 95.

[77] *Id.*

serious violations of international law have a right to fair and adequate reparations, which shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations."[78]

For women, the ability to break silence around crimes of sexual violence and shift the burden of responsibility and shame to the perpetrators where it properly belongs, has additional significance. It is a vehicle through which women can restore their dignity and reclaim their rightful place in their communities.

> By making a public complaint or accusation, the survivor defies the perpetrator's attempt to silence and isolate her, and she opens the possibility of finding new allies. When others bear witness to the testimony of a crime, others share the responsibility for restoring justice.... [A]s in the case of private, family confrontations, the survivor draws power from her ability to stand up in public and speak the truth without fear of the consequences. She knows that truth is what the perpetrator most fears. The survivor also gains satisfaction from the public exercise of power in the service of herself and others.[79]

Challenging impunity throught justice is also essential to the elimination of gender-based discrimination and to building a sound foundation for peace and true democracy. As the UNIFEM Report concludes:

> Accountability on the part of the states and societies for crimes against women means more than just punishing perpetrators. It means establishing the rule of law and a just

[78] McDougall, Slavery-Like Practices, 88.
[79] Judith Lewis Herman, *Trauma and Recovery,* 210 (Basic Books, 1997).

> social and political order. Without this, there can be no lasting peace. Impunity weakens the foundation of societies emerging from conflict by legitimizing violence and inequality. It prolongs instability and injustice and exposes women to the threat of renewed conflict.[80]

Congress has wisely and clearly given the federal courts power to hear torts in violation of the evolving law of nations under ATCA. In so doing, it has authorized the federal courts to participate in the global discourse on customary international law and to be a bulwark against impunity for perpetrators who make it to this country.

Globally, we are living in a time of evolving challenges to human rights and multiplying remedies for violations of customary international law internationally and in nations around the globe. For this Court to nullify this Act of Congress would not only usurp the prerogative of Congress and cabin the Court's proper role; it would also remove a significant means of deterring and detecting perpetrators, strengthening the rule of law, and providing long-overdue redress to women who have been not only victimized by gender violence but also by the impunity its perpetrators have heretofore enjoyed.

[80] Women, War & Peace, para. 89.

CONCLUSION

Wherefore, the *amici curiae* urge this Court to reject petitioners' effort to nullify the ATCA and affirm the decision of the Ninth Circuit below.

Respectfully submitted,

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